United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7168

To be argued by:
RONALD E. STERNBERG

ORIGINAL

B
p/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TEACHERS UNITED FOR FAIR TREATMENT, KENNETH BOBROWSKY, BLOSSOM FOGEL, HARRIET GREENBAUM, LaFRANCES HILLS, ALICE LUBITCH, MARY McAULAY, JOSEPH McCRUM, MAURICE MENDOZA and PAMELA MARLAND,

Appellants,

-against-

IRVING ANKER, Chancellor of the Board of Education of the City of New York; ISAIAH ROBINSON, President of the Board of Education of the City of New York; and JAMES F. REGAN, a Member of the Board of Education of the City of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF NEW YORK.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
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Appellants,

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IRVING ANKER, Chancellor of the Board of Education of the City of New York; ISAIAH ROBINSON, President of the Board of Education of the City of New York; and JAMES F. REGAN, a Member of the Board of Education of the City of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF NEW YORK.

APPELLEES' BRIEF

Preliminary Statement

Appellants appeal from an order of the District Court for the Eastern District of New York (PRATT, J.), dated March 8, 1977, which granted appellees' motion for summary judgment and dismissed the complaint in its entirety (A30).* In his opinion, Judge Pratt held that, for various reasons, summary judgment against each of the appellants was warranted (A5-A30).

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*Numbers in parentheses refer to Appellants' Appendix.

Question Presented

1. Whether summary judgment in favor of appellees and against each of the appellants was properly granted?

Facts

Appellant Teachers United for Fair Treatment ("TUFT") is a non-profit organization whose membership consists of approximately 125 teachers who have been disciplined by the Board of Education pursuant to statute, bylaw and various rules and regulations (A5). The individual appellants are members of TUFT, and each has been either the subject of disciplinary measures or has been terminated by the Board for medical reasons (A31). The facts with respect to each individual appellant are discussed in the argument portion of this brief.

In the instant action, appellants allege nine causes of action pursuant to 42 U.S.C. §1983; jurisdiction is predicated upon 28 U.S.C. §§1331 and 2201 (A31).*

In a wide ranging challenge to the disciplinary and termination procedures utilized by appellees, appellants seek damages as well as an order, inter alia, declaring various sections of the Education Law and Bylaws of the Board of Education unconstitutional and enjoining their enforcement; requiring hearings prior to psychiatric examinations; prohibiting appellees from ordering psychiatric evaluations of prospective teachers; prohibiting teacher transfers without prior hearings; and

*Appellants also allege jurisdiction under 28 U.S.C. §1346. That section, however, is applicable only to actions in which the United States is a defendant, and it is clearly an inappropriate basis upon which to predicate jurisdiction in the instant action.

ordering that hearings and other disciplinary proceedings be conducted by persons not paid by the Board of Education (A58-A59).

Appellees moved, pursuant to F.R. Civ. P., Rule 56, for an order granting summary judgment to appellees (A70). In an order dated March 8, 1977, Judge Pratt granted appellees' motion for summary judgment and dismissed the complaint in its entirety (A30).

Opinion Below

In an exhaustive opinion detailing the claims of each of the appellants, Judge Pratt concluded that summary judgment against each of them was warranted. The Judge based his decision on several grounds including lack of standing, res judicata, statute of limitations and failure to state a claim upon which relief could be granted (A5-A30).

ARGUMENT

SUMMARY JUDGMENT IN FAVOR OF APPELLEES AND AGAINST EACH OF THE APPELLANTS WAS PROPERLY GRANTED.

Alice Lubitch

Appellant Lubitch was a tenured teacher of physical education at Martin Van Buren High School in the City of New York, Queens County (A50). On November 22, 1973, during the course of her teaching duties, she sustained injuries when she was hit in the face with a

volleyball (A50; Ex. "A", par. 5).* Following medical examinations by Board of Education physicians in December, 1972 and February and March, 1973, appellant received line-of-duty accident pay through June 30, 1973 (Ex. "A", par. 6; Ex. "B", pars. 4, 5). Thereafter, appellant's absence from her position was approved as a personal illness, and she received her full salary as sick leave benefits through January 31, 1974 (Ex. "A", par. 6).

Contrary to appellant's allegation in the complaint (A50), it is clear that she was again examined by Board physicians in November and December, 1973 (Ex. "B", par. 6). On the basis of all of the medical reports, including those of her own doctor, the Board determined that appellant was not entitled to continued line-of-duty accident pay, and, on January 22, 1974, she was ordered to return to work or submit her resignation (Ex. "A", pars. 7, 8).

On or about April 15, 1974, appellant commenced a proceeding in the New York Supreme Court pursuant to Article 78 of the New York Civil Practice Law and Rules ("Article 78 proceeding") to review, inter alia, the determination of the Board denying her continued accident pay (A88; Ex. "A"). Even a cursory review of the papers submitted

*References to exhibits are to those exhibits annexed to appellees' statement pursuant to Rule 9(g) applicable to the particular appellant being discussed. While appellants' appendix, submitted without consultation with appellees, contains the Rule 9(g) statements, the exhibits (i.e., the data upon which the statements are based) were excluded.

by appellant in that proceeding demonstrates beyond peradventure that the due process claims which she attempts to raise herein were thoroughly and completely raised and discussed in the state court. See, e.g., Ex. "A", pars. 9, 10, 11; Ex. "B", par. 14; Ex. "C", par. 4; Ex. "D"; Ex. "E".

In a memorandum decision dated October 25, 1974, Justice Schwartzwald dismissed appellant's petition in all respects (A89). Lubitch v. Board of Education, N.Y.L.J., October 31, 1974, p. 19, col. 4 (Sup. Ct., Kings Co.). A judgment dismissing the proceeding on the merits was entered on November 21, 1974 (A89; Ex. "G"), and, although appellant served and filed a notice of appeal to the Appellate Division, Second Department (A89; Exs. "H", "I"), the appeal, apparently, was not pursued. In his opinion, Justice Schwartzwald specifically addressed, and summarily rejected, appellant's due process claims (Ex. "F", p. F-1):*

> "Petitioner strains to interject a due process issue in this proceeding but the court finds no such issue involved. Respondents followed the statute which sufficient[ly] satisfied the due process requirements of the constitution. Petitioner received all proper notices; she was permitted to introduce her own medical proof to support her position. Contrary to petitioner's assertions, she was given copies of respondents' medical reports to assist her in her presentation."

*The constitutional issues raised by appellant in the Article 78 proceeding were properly considered by the Court. See Matter of Kovarsky v. Housing and Development Administration, 31 NY 2d 184, 191-193 (1972); see also, Lombard v. Board of Education, 502 F. 2d 631, 636-637 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

Thereafter, appellant commenced a second Article 78 proceeding wherein she alleged that the Board of Education had illegally deprived her of accident pay despite the fact that, after further medical examinations, it had found that she was apparently unfit to teach and had placed her on leave without pay for restoration of health (A89-A90; Ex. "J"). Appellant's allegations in the second Article 78 proceeding parallel the allegations she makes herein (compare Ex. "J", with the Fourth Cause of Action herein, A50-A51), and the relief requested in the instant action is essentially identical to the relief requested in the state court proceeding (compare the "Wherefore" clause, Ex. "J", p. J-6, with the "Wherefore" clause (9) herein, A59).

In a memorandum decision dated August 6, 1975, Justice Heller dismissed appellant's petition (A90). In re Lubitch, N.Y.L.J., August 12, 1975, p. 9, col. 5 (Sup. Ct., Kings Co.). A judgment dismissing the proceeding on the merits was entered on August 22, 1975 (A90; Ex. "L"), and, although appellant served and filed a notice of appeal to the Appellate Division, Second Department (A90; Ex. "M"), the appeal, apparently, was not pursued. In his opinion, Justice Heller said (Ex. "K"):

> "In this Article 78 proceeding petitioner purportedly challenges respondent's placing petitioner on leave without pay for restoration of health.

> "If petitioner truly seeks to challenge respondent's ruling she need merely report for work and maintain a normal work schedule. It is of no matter to either party if petitioner be deemed fit or unfit for duty. The pivotal issue is whether petitioner's condition, whatever it is, is medically related to her previous duties. Respondent's contention that such condition is not related was upheld by Judge Schwartzwald who dismissed an earlier Article 78 proceeding for the same relief. In reality, petitioner seeks to relitigate that earlier proceeding and this she cannot do; res judicata bars her path."

It is well established that a party may not seek relitigation in the federal courts of constitutional issues previously litigated in state courts. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930); Turco v. Monroe County Bar Association, 554 F.2d 515 (2d Cir. 1977); Mitchell v. National Broadcasting Co., 553 F. 2d 265 (2d Cir. 1977); Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974), cert. denied, 419 U.S. 1093 (1974); Lecci v. Cahn, 493 F. 2d 826 (2d Cir. 1974); Tang v. Appellate Division of the New York Supreme Court, First Department, 487 F. 2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974); Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52 (2d Cir. 1971); Katz v. State of Connecticut, 433 F.2d 878 (2d Cir. 1970). As noted above, even a cursory comparison of appellant's allegations herein with the pleadings and other papers submitted in the two prior state court proceedings demonstrates conclusively that the issues raised in this action have been fully and

finally adjudicated by the courts of the State of New York.

Appellant's contention in her brief (p. 15) that the instant action is not barred by the prior state court proceedings because the state courts "did not base their decisions on constitutional grounds, and any reference to such was dicta" is frivolous. Justice Schwartzwald, as noted, specifically rejected appellant's constitutional claims. In any case, the key fact is that appellant chose to raise and litigate those claims in the state courts. Whether an opinion makes any reference to the constitutional issue or whether a court even chooses to write an opinion "is of course immaterial". Lecci v. Cahn, supra, 493 F.2d at 830.

Appellant's further contention that her damage claim precludes the prior state court proceedings from being a bar to the instant action is equally untenable. It is clear that, notwithstanding the remedy sought, it is the identity of claims which determines whether an action is barred by prior proceedings. In any case, appellees having been sued in their official, rather than individual, capacities, the District Court is without jurisdiction to entertain an action for damages pursuant to 42 U.S.C. §1983. Monell v. Department of Social Services of the City of New York, 532 F.2d 259 (2d Cir. 1976), cert. granted, 429 U.S 1071 (1977).

What appellant is, in fact, seeking is appellate review of the decisions of the state tribunals. It is clear, however, that the District Court lacks jurisdiction

to review state court determinations of federal constitutional issues; no United States court other than the Supreme Court can entertain a proceeding to review or modify state court determinations. Rooker v. Fidelity Trust Co., supra, 263 U.S. at 416; see also, Lecci v. Cahn, supra, 493 F.2d at 829; Tang v. Appellate Division, supra, 487 F.2d at 141; Coogan v. Cincinnati Bar Association, 431 F. 2d 1209, 1211 (6th Cir. 1970).

This Court's decisions in Lombard v. Board of Education, supra, 502 F.2d 631, and Newman v. Board of Education, 508 F.2d 277 (2d Cir. 1975), cert. denied, 420 U.S. 1004 (1975), do not require a different result. As stated in Lombard (502 F.2d at 636-637): "Of course, where a constitutional issue is actually raised in the state court,... the litigant has made his choice, and may not have two bites of the cherry." Appellant's papers submitted in the state court proceedings are replete with "elaborations" and "citations of authority" (Newman v. Board of Education, supra, 508 F.2d at 278) to support her claims of denial of due process. Indeed, her entire memorandum of law and supplemental memorandum of law submitted in her first Article 78 proceeding are devoted to a discussion of the alleged due process issue (Exs. "D" and "E"). The memorandum concludes (Ex. "D", pp. D6-D7):

> "In light of the many denials of due process committed by the Board of Education in the instant case, the decision of the defendants denying her leave of absence based on in-line-of-duty

> injury and denying her disability is [sic.] reversed and the Board is [sic.] ordered to reinstate her disability payments pending a fair hearing at which time petitioner will be afforded due process."

Whether the bar in the instant action is categorized as "res judicata," "comity," "collateral estoppel," "claim preclusion" or any other label is immaterial. See Paddington East Enterprises, Inc. v. Roth, 70 F.R.D. 458, 460, n. 2 (S.D.N.Y. 1975). "... [W]hile it is clearly a federal policy to allow every plaintiff with a colorable claim his day in court, it is equally clearly not a court's duty to encourage career litigants by allowing a federal duplication of state trials." Thistlethwaite v. City of New York, supra, 497 F.2d at 341. Following appellant's pursuit of relief in the state courts, her attempted use of the Civil Rights Act as a vehicle to escape the consequences of the prior determinations is a blunt and unnecessary affront to the state legal system. See Lecci v. Cahn, supra, 493 F.2d at 830. The prior state court proceedings bar the fourth cause of action herein with respect to appellant Lubitch, and, therefore, the District Court's grant of summary judgment against her was, in all respects, proper and should be affirmed.

Pamela Marland

Appellant Marland is a tenured teacher at Seward Park High School in the City of New York, New York County (A43). At the conclusion of the 1972-1973 academic year, she was given an unsatisfactory rating by her principal on the basis of her performance during the year (A83; Ex. "A", p. A-1). Pursuant to the review procedures established pursuant to Section 105a of the Bylaws of the Board of Education, this rating was sustained by the Chancellor, appellee Anker (A83; Ex. "A", p. A-13). Thereafter, appellant commenced an Article 78 proceeding to review the determination of the Chancellor (A83). Even a cursory review of the papers submitted by appellant in that proceeding demonstrates beyond peradventure that all of the claims that she raises herein in the second cause of action were raised and thoroughly discussed in the state court. See, e.g., Ex. "A", p. A-1; pp. A-4, par. 9; pp. A-5 - A-8, pars. 12-21; pp. A-8 - A-9, "Wherefore" clause.

In a decision dated June 20, 1975, Justice Frank reversed the Chancellor's determination and remanded the matter to the Board of Education. The basis for Justice Frank's decision was that certain procedures mandated by the Board's Bylaws had not been followed in that an assistant superintendent had not "observed" and "consulted with" appellant during the academic year in question. However, Justice Frank specifically discussed and rejected appellant's claims that she was denied due process (Ex. "B").

The prior state court proceeding bars the second cause of action herein with respect to appellant Marland, as more fully discussed supra, p. 7-10. Her due process claims having been fully raised and litigated in the Article 78 proceeding, appellant is not now entitled to "a second bite of the cherry". Lackawanna Police Benevolent Association v. Balen, supra, 446 F.2d at 53. Also, in addition to being barred by the prior state court proceeding, appellant's cause of action was mooted by virtue of her unsatisfactory rating being reversed by the state court.

It is submitted, however, that even if appellant's action is neither moot nor barred by the prior proceeding, her allegation that the unsatisfactory rating deprived her of liberty so as to entitle her to procedural due process is wholly untenable, as more fully discussed infra, pp. 27-29. It is thus clear that, in light of all of the above, the District Court's grant of summary judgment was, in all respects proper, and should be affirmed.

Blossom Fogel

(1)

Appellant Fogel was a tenured guidance counselor at Alexander Hamilton Vocational High School in the City of New York, Kings County, when she was dismissed from her position on June 28, 1973, following the preferment of charges against her and a hearing held pursuant to Section 105 of the Bylaws of the Board of Education (A95-A96). Thereafter, on or about November 12, 1973, appellant commenced an Article 78 proceeding to review the determination of the Board (A96). In her petition in that proceeding, appellant alleged essentially identical due process claims as she raises in the instant action (see, Ex. "B", pars. 9, 12, 17).

Upon transfer of the proceeding to the Appellate Division, Second Department, appellant, who was represented in that proceeding by the same counsel who represents her herein, submitted a brief and reply brief wherein she exhaustively raised and discussed her claims that she was denied due process (A96; Exs. "E", "F"; compare, e.g., Ex. "E", pp. E-12 - E-17, with pp. 25-31 of Appellant's Brief submitted in this action). The Appellate Division annulled the determination of dismissal and remanded the matter to the Board "with a direction to afford petitioner and her attorney a reasonable opportunity to respond to the findings and recommendation contained in the Trial Examiner's report prior to the taking by it of any further action." The Court stated further that it had considered

the other contentions raised by appellant and had found them to be "without merit" (A96-A97; Ex. "G"). Matter of Fogel v. Board of Education, 48 AD 2d 925 (2d Dept. 1975).

Appellant was thereafter given a copy of the examiner's report and was permitted to submit a written reply to the Board. Following a review of the entire record, the Board, on January 21, 1976, reaffirmed its prior determination that appellant should be dismissed (A97; Exs. "H", "I"). Appellant then commenced an appeal of her dismissal to the Commissioner of Education, wherein she again raised substantially identical due process claims as she raises in the instant action (A98; Ex. "P"). The proceeding before the Commissioner is now pending.

The first cause of action with respect to appellant Fogel is barred by virtue of her prior state court proceeding, as more fully discussed supra, pp. 7-10. The fact that she alleges the unconstitutionality of sections of the Education Law and Bylaws of the Board does not change this result. Appellant alleges that the statutory provisions resulted in a denial of due process, but the alleged denial was precisely the issue raised in her Article 78 proceeding. The issue having once been litigated, appellant is not entitled to "a second bite of the cherry". Lackawanna Police Benevolent Association

v. Balen, supra, 446 F.2d at 53.*

However, even if appellant's action is not barred by the prior state court proceeding, summary judgment against her should be affirmed since she has appealed her dismissal to the Commissioner, and that appeal has not been concluded. Upon her dismissal, appellant voluntarily chose to take her appeal to the Commissioner (see Education Law, §2573[6]), and, as noted, she has raised essentially identical due process allegations on that appeal as she raises in the instant action (Ex. "P"). In accord with this Court's continued adherence to the requirement that, in most cases, administrative remedies must be exhausted prior to the commencement of a civil rights action (see Fuentes v. Roher, 519 F.2d 379, 386 [2d Cir. 1975]; Plano v. Baker, 504 F.2d 595, 597 [2d Cir. 1974]; Eisen v. Eastman, 421 F.2d 560 [2d Cir. 1969], cert. denied, 400 U.S. 841 ([1970]), it is submitted that appellant's voluntary choice of remedies precludes her from commencing a federal action prior to a decision by the Commissioner.

Certainly, "practical notions of judicial efficiency" (McKart v. United States, 395 U.S. 185, 195 [1969])

*It is also noted that appellant challenges Education Law, Section 2590-j(7), which, however, is applicable only to community school districts, i.e., elementary and junior high schools. As a high school guidance counselor, appellant was dismissed pursuant to Education Law, Section 2573 (6) and (7), applicable to city school districts. Indeed, in her state court proceeding, appellant recognized this distinction (see, Ex. "E", p. E-5). Appellant clearly does not have standing to challenge the constitutionality of a statute which has absolutely no relationship to her situation.

require such a result. If appellant prevails on her appeal, the courts may never have to intervene in the process at all. Appellant could have chosen to press her claims in a federal forum in the first instance. However, since she has made her choice, and she has not in this action alleged that the proceeding before the Commissioner denies her due process (cf. Gonzalez v. Shanker, 533 F. 2d 832 [2d Cir. 1976]), appellant should be required to await the outcome of the administrative process.*

(2)

In the second cause of action, appellant Fogel alleges that the procedures established pursuant to the Bylaws of the Board of Education to review unsatisfactory ratings denied her due process. Although she does not specify which ratings she is challenging, it is clear that she last received unsatisfactory ratings in 1971 and 1972 (A95).

In the fifth and sixth causes of action appellant alleges that an involuntary transfer denied her due process of law. Although, again, appellant fails to specify the particular transfer to which she refers, the records of the Board of Education indicate that she was transferred in the Fall of 1971 (A95).

*In light of appellant's voluntary appeal to the Commissioner, her damage claim in the instant action does not preclude application of the exhaustion doctrine. Cf. Plano v. Baker, supra, 504 F. 2d at 599. In any case, as noted supra, p. 8, the District Court lacks jurisdiction to entertain the claim for damages.

Since the instant action was commenced on or about February 16, 1976, each of these causes of action with respect to appellant Fogel is barred by the three year statute of limitations applicable to actions pursuant to 42 U.S.C. §1983 brought in the State of New York. Meyer v. Frank, 550 F.2d 726, 728 (2d. Cir. 1977); Kaiser v. Cahn, 510 F. 2d 282, 284 (2d Cir. 1974); Swan v. Board of Higher Education, 319 F. 2d 56, 60-61 (2d Cir. 1963).

Summary judgment against appellant Fogel was thus properly granted and should be affirmed by this Court.

Mary McAulay

In the fifth and sixth causes of action, appellant McAulay alleges that an involuntary transfer denied her due process of law. Although appellant fails to specify the particular transfer to which she refers, the records of the Board of Educaton show that she was ordered transferred at the close of the 1970-1971 academic year. However, she instituted a state court proceeding to stay the transfer, which stay was granted, and the transfer never occurred (A84). See Matter of McAulay v. Board of Education, 46 AD 2d 84 (1st Dept. 1974). Moreover, as held by the District Court, "any residual claim which may arise from the attempted transfer is now barred by the [three year] statute of limitations." Meyer v. Frank, supra, 550 F. 2d 726; Kaiser v. Cahn, supra, 510 F. 2d 282; Swan v. Board of Higher Education, supra 319

F. 2d 56. To the extent that appellant relies on a transfer which occurred in 1973, such claim is clearly frivolous since she requested the transfer (A84; Ex. "A").

Summary judgment against appellant McAulay with respect to the fifth and sixth causes of action was thus properly granted and should be affirmed by this Court.

Joseph McCrum

(1)

Appellant McCrum was a tenured teacher of biology and general science at Lafeyette High School in the City of New York, Kings County. By letter dated February 8, 1977, he was charged by Chancellor Anker with "incompetent and inefficient service" and was suspended with pay. In April, 1974, appellant was served with a notice of hearing and the specifications of the charges against him. Pursuant to Education Law, Section 2573(7), and Section 105 of the Bylaws of the Board of Education, a hearing on the charges was conducted in June and July, 1974. Appellant, who was represented by counsel, testified at length in his own behalf, presented witnesses, cross-examined the Board's witnesses and entered numerous documents into evidence (A92-A93).

At the conclusion of the hearing, the trial examiner determined that the charges had been sustained, and he recommended that appellant be dismissed from his position. The Board of Education adopted the findings and conclusions of the trial examiner and discharged appellant, who then commenced an Article 78 proceeding in the state courts challenging the Board's determination. Following established policy, the Board had not given appellant an opportunity to review the report of the trial examiner prior to the Board's determination. However, in

in view of the decision in Fogel v. Board of Education, 48 AD 2d 925 (2d Dept. 1975), decided subsequent to the Board's determination in appellant's case, the Board consented to an annulment of its determination in order to permit appellant to respond to the trial examiner's report (A93-A94).

The Board then provided appellant with a copy of the report and appellant submitted a memorandum in reply. Following a review of all of the evidence in the proceeding, including appellant's memorandum, the Board, by resolution dated March 24, 1976, reaffirmed its prior decision and dismissed appellant from his position (A94). Appellant thereafter served an amended petition in his Article 78 proceeding, wherein he sought a judgment vacating the March 24, 1976 decision of the Board and directing that he be reinstated and that the charges against him be dismissed.

In an order entered July 18, 1977, the Appellate Division, Second Department, annulled the Board's determination and remitted the matter for a new hearing and determination. The Court held that the results of examinations given to appellant's students were relevant in determining his competency as a teacher and that, therefore, appellant's offer of the examination grades into evidence had been improperly rejected by the hearing examiner. Matter of McCrum v. Board of Education, - AD 2d -, 396

N.Y.S 2d 691 (2d Dept. 1977).

The result of all of the state court proceedings is that, once again, appellant McCrum will be given a hearing embodying a full panoply of due process rights, including a statement of the charges against him; the right to counsel; and the opportunity to testify, present witnesses on his own behalf, cross examine witnesses against him, offer documents into evidence, and respond to the report of the hearing examiner prior to a final determination by the Board of Education. It is submitted that the doctrine of exhaustion of administrative remedies, which this Court continues to recognize (see, e.g., Fuentes v. Roher, supra, 519 F. 2d at 386), requires that appellant be precluded from bringing a federal civil rights action pending the outcome of the entire administrative process.

The hearing required by Education Law, Section 2573(6) and (7), and Section 105 of the Bylaws of the Board of Education is neither an "inadequate" administrative remedy, nor is it "certainly or probably futile". Eisen v. Eastman, supra, 421 F. 2d at 569. Given both the "benefits to be derived from a sensible application of the exhaustion doctrine" (Plano v. Baker, supra, 504 F. 2d at 597) and this Court's recognition that "New York is quite protective of the rights of tenured teachers" (Fuentes v. Roher, supra, 519 F. 2d at 383), appellant's judicial remedies, if any, must await a determination of the Board of Education

following the conclusion of the hearing.

Appellant's allegations of due process violations (A42) are so vague and insubstantial as not to require an exception to the exhaustion requirement and the intervention of the federal courts prior to the termination of the administrative process:

A) The Education Law, The Bylaws of the Board and the charges and specifications served on appellant (Exs. "A", "D") were sufficient to put petitioner on notice of the prohibited conduct. See Arnett v. Kennedy, 416 U.S. 134 (1973); Matter of Rathbone v. Board of Education, 47 AD 2d 172 (3rd Dept. 1975);

B) Since the decision in Fogel v. Board of Education, supra, 48 AD 2d 925, the Board provides teachers with copies of the report of the hearing examiner, and they are permitted to respond to the report prior to the Board's determination. Indeed, as noted, appellant was given this opportunity, and he submitted a lengthy memorandum to the Board (Ex. "I");

C) The fact that the hearing examiner is employed by the Board does not, without more, amount to a denial of due procees. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). Absent allegations of actual bias or prejudice, which appellant surely cannot make prior to his hearing, there is a "presumption of honesty and integrity in those serving as adjudicators" (Withrow v. Larkin, 421 U.S. 35, 47 [1975]),

and they are "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances". United States v. Morgan, 313 U.S. 409, 421 (1941);

D) The Board is required by statute to review the entire record and to set forth the reasons and the factual basis for its decisions. Education Law, §2573(7). Absent allegations that the Board has not done so in a particular instance, it must be presumed that the Board will adhere to the statutory requirements;

E) New York law requires that the determination of the Board be supported by substantial evidence (see Matter of Pell v. Board of Education, 34 NY 2d 222 [1974]), and, appellant, of course, can seek judicial redress in the New York courts if the Board deviates from this requirement in his particular case.

In light of all of the above, summary judgment against appellant McCrum with respect to the first cause of action should be affirmed.

(2)

In the second cause of action, appellant challenges the constitutionality of the procedures utilized by the Board of Education, pursuant to Section 105a of its Bylaws, to review unsatisfactory ratings which he has allegedly received "since 1967" (A36). Since this action was commenced on or about February 16, 1976, appellant's challenge to any rating he received prior to February,

1973 is barred by the three year statute of limitations applicable to federal civil rights actions brought in New York. Meyer v. Frank, supra, 550 F. 2d at 728; Kaiser v. Cahn, supra, 510 F. 2d at 284; Swan v. Board of Higher Education, supra, 319 F. 2d at 60-61.

To the extent that appellant challenges unsatisfactory ratings which he received subsequent to February, 1973, he has failed to state a cause of action under 42 U.S.C. §1983, as more fully discussed infra, pp. 27-29.

(3)

In the fifth and sixth causes of action, appellant alleges that an involuntary transfer denied him due process of law. Appellant, however, has failed to specify the particular transfer to which he refers, and the records of the Board of Education do not indicate that any such transfer occurred. In any case, it is clear that prior to his suspension, appellant had taught at Lafayette High School since 1970 (A92). Therefore, any claim which he might have with respect to a transfer is barred by the three year statute of limitations.

Harriet Greenbaum

(1)

Appellant Greenbaum is a tenured teacher of libray at Erasmus High School in the City of New York, Kings County (A86). In April and May, 1974, charges were preferred against her pursuant to Education Law, Section 2573(6) and (7), and the Bylaws of the Board of Education, Section 105 (A86; Ex. "A"), and she was served with specifications and a notice of hearing (A87; Exs. "B", "C", "D"). The hearing was concluded in June of this year, but the hearing examiner has not, as of this date, submitted his findings and recommendations to the Board.

In the first cause of action, appellant alleges that the hearing procedures denied her due process. It is submitted, however, that, as more fully discussed supra, pp. 21-23, appellant's judicial remedies, if any, must await the conclusion of the entire administrative process and a determination by the Board with respect to whether appellant should be dismissed. Summary judgment against appellant Greenbaum should, therefore, be affirmed.

(2)

In the fifth and sixth causes of action appellant alleges that an involuntary transfer denied her due process. She does not, however, state when her transfer took place, and the records of the Board of Education do not indicate that there has ever been such a transfer. In

any case, appellant's contention that a transfer to another school pursuant to statute rises to the level of a deprivation of due process is untenable (see Sullivan v. Brown, 544 F. 2d 279 [6th Cir. 1976]; cf. Meachum v. Fano, 427 U.S. 215 [1976]), and, in fact, she has not pursued the issue on this appeal.

Kenneth Bobrowsky

Appellant Bobrowsky is presently a tenured teacher of biology and general science at Bronx High School of Science in the City of New York, Bronx County. At the conclusion of the 1972-1973 academic year, his services were rated unsatisfactory by his principal (A77; Ex. "A"). Prior to any administrative review of the rating, appellant commenced an Article 78 proceeding contending that he was entitled to representation by counsel at any administrative appeal of his unsatisfactory rating (A77; Ex. "B"). Appellant's petition, however, was dismissed (A77; Ex. "C"). A review pursuant to Section 105a of the Bylaws of the Board

of Education was thereafter held, and the Committee unanimously recommended that appellant's appeal be dismissed. After a review of the entire record, Chancellor Anker adopted the recommendation and sustained the unsatisfactory rating (A77; Ex. "D").

In the second cause of action, appellant appears to allege that the unsatisfactory rating deprived him of liberty so as to entitle him to procedural due process. Recent Supreme Court decisions, however, make it absolutely clear that appellant's claims are untenable.*

Paul v. Davis, 424 U.S. 963 (1976), is dispositive of the issues raised by appellant. In Paul, the Court held that the defamation of a person by state officials does not, without more, deprive him of any "liberty" or "property" interests protected by the Due Process Clause of the Fourteenth Amendment. In discussing its decision in Board of Regents v. Roth, 408 U.S. 564 (1972), the Court said (424 U.S. at 709, 710):

*Appellant makes no allegation in his complaint that his unsatisfactory rating was a deprivation of a "property" interest within the meaning and intent of the Fourteenth Amendment. Indeed, any claim that he was entitled to a satisfactory rating would be frivolous on its face; no "rules [of the Board of Education] or mutually explicit understandings" would support such a claim. See Perry v. Sinderman, 408 U.S. 593, 601 (1972). Appellant's belabored attempt in his brief (pp. 17-18) to demonstrate that a "property" interest had been affected is totally unconvincing. If appellant should be terminated at some future time, different considerations, perhaps, would be applicable; at this time, however, appellant continues to retain his position.

> "While Roth recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment .... Certainly there is no suggestion in Roth to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee."

While appellees certainly do not concede that an unsatisfactory rating is in any respect defamatory, it is clear that, even if it were, appellant, who has retained his position as a tenured teacher, has not alleged a cause of action cognizable under 42 U.S.C. §1983.

However, even if an unsatisfactory rating is held to implicate a "property" or "liberty" interest so as to require procedural due process, appellant's allegations are patently insufficient to state a cause of action. First, although appellant alleges that he has "consistently been rated satisfactory and has been recognized nationally for his ability" (A43), he does not allege in his pleadings or elsewhere that the particular unsatisfactory rating in question was undeserved or in any unwarranted. Absence of such an allegation is fatal to appellant's claim. Codd v. Velger, 429 U.S. 624 (1977). Second, as more fully discussed infra, pp. 31-32, vague allegations of stigma without any further allegations that appellees publicly disseminated

a false and defamatory impression about appellant is also inadequate to state a claim for relief. Bishop v. Wood, 426 U.S. 341 (1976). Finally, as more fully discussed infra, pp. 32-33, appellant's conclusory allegation that the unsatisfactory rating "significantly diminished his ability to obtain outside employment" (A43) is plainly deficient by virtue of the Supreme Court's recognition that even proof that a record of nonretention in one job might make a person somewhat less attractive to other employers "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty'". Board of Regents v. Roth, supra, 408 U.S. at 574, n. 13.

In light of all of the above, it is submitted that summary judgment against appellant Bobowsky was properly granted and should be affirmed in all respects. If appellant feels aggrieved by the procedures established by the Board of Education, his remedy, if any, lies solely within the province of the New York State courts. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Bishop v. Wood, supra, 426 U.S. at 349.

LaFrancis Hills

Appellant Hills was a probationary teacher at Public School 21, District 16, in the City of New York, Kings County (A79). On the basis of several medical examinations, it was determined that she was medically unfit to teach (A79-A82).

In the third cause of action, appellant appears to allege that because her termination was based upon the fact that she was found to be "medically/psychiatrically unfit" (A50), she was entitled to a full range of procedural due process rights. Recent Supreme Court decisions, however, make clear that appellant's contentions are wholly untenable. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, supra, 408 U.S. at 569.

Appellant's termination did not involve the deprivation of a property interest. The sufficiency of a claim of entitlement must be decided by reference to state law (Bishop v. Wood, supra, 426 U.S. at 344), and New York law clearly provides that a probationary teacher has no right to continued employment. Matter of Kaufman v. Anker, 42 NY 2d 835, 836 (1977); Matter of Bergstein v. Board of Education, 34 NY 2d 318, 322 (1974); see Haron v. Board of Education, 411 F. Supp. 68 (E.D.N.Y. 1976). Where

there is "no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire [appellant] presents no federal constitutional question." Codd v. Velger, supra, 429 U.S. at 628.

Nor did appellant's termination deprive her of a "liberty" interest so as to require procedural due process. Appellant does not contend that the Board of Education ever publicly disseminated the reasons for her termination. This fact alone precludes a finding that the termination stigmatized appellant and seriously damaged her standing and associations in the community so as to require procedural due process. Bishop v. Wood, supra, 426 U.S. 341.

In Bishop, the petitioner's employment as a policeman was terminated without his being afforded a hearing to determine the sufficiency of the reasons for the termination. The reasons, however, were communicated orally to the petitioner in private, and he contended that the absence of a hearing had deprived him of liberty because the reasons given for the termination were "so serious as to constitute a stigma that may severly damage his reputation in the community". 426 U.S. at 347. The Supreme Court summarily rejected this contention, noting that since the communication to petitioner was not made public, "it cannot properly form the basis for a claim that petitioner's

interest in his 'good name, reputation, honor, or integrity' was thereby impaired". 426 U.S. at 348.

In Codd v. Velger, supra, 429 U.S. 624, the Court reiterated the necessity for public dissemination of injurious charges before due processs requires a hearing prior to termination:

> "... [T]he hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' ... Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required." 429 U.S. at 627-628 (emphasis added).

In the instant case, the Board of Education did not create and disseminate a false and defamatory impression about appellant. Indeed, it is the Board's strict policy not to disclose the contents of medical files to members of the public (A73-A75), and appellant does not suggest that anyone sought information about her from the Board. In the absence of public disclosure of the reasons for appellant's termination, she cannot invoke the Fourteenth Amendment by claiming that her standing in the community has been damaged.*

Further, appellant's conclusory allegation that her termination by the Board significantly impaired her ability to obtain other employment (A50) is patently insufficient to implicate Fourteenth Amendment liberty interests. Even if appellant had alleged that specific job opportunities had been lost because of her termination,

*To the extent that Stewart v. Pearce, 484 F. 2d 1031 (9th Cir. 1973), relied upon by appellant (Appellants' Brief, p. 23), implies that public disclosure is not a prerequisite to the implication of liberty interests, it has been limited by the Supreme Court's subsequent decisions in Bishop and Codd.

that, without more, would not be a denial of liberty. The Supreme Court has so stated in Board of Regents v. Roth, supra, 408 U.S. at 574, n. 13:

> "Mere proof ... that [appellant's] record of nonretention in one job, taken alone, might make [her] somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'"

Perhaps, if appellant had alleged specific instances wherein she had been deprived of other employment opportunities because of "stigmatizing" material in her files, and that such material was false (Codd v. Velger, supra, 429 U.S. 624), the result might have been different. Appellant, however, has utterly failed to make such allegations, and such failure is fatal to her complaint.

In light of all of the above, it is submitted that the grant of summary judgment against appellant Hills with respect to the third cause of action was proper and should be affirmed. Her remedy, if any, must be sought in the state courts.

Maurice Mendoza

(1)

Appellant Mendoza submitted an application to the Board of Education for the position of bilingual professional assistant. After successfully completing an interview he was permitted to serve in a non-tenured position pending the required physical and medical examination (A85, A86; Ex. "H"). The examination was held in April, 1972, and, by memorandum dated September 5, 1972, the Committee on Medical Examinations stated its agreement with the Medical Division that appellant's physical and medical condition be considered "not fit" (A85; Ex. "A"). Appellant was thereafter notified that, for medical reasons, he had been denied a Certificate of Competency and that his services would be terminated as of December 31, 1972 (A85; Ex. "B").

In the third cause of action, appellant appears to allege that because his termination was based upon the fact that he was found to be "medically/psychiatrically unfit" (A50), he was entitled to a full range of procedural due process rights. However, as held by the District Court (A27-A28), all of the acts complained of by appellant, including his termination, occurred on or before December 31, 1972. Since the complaint in this action was filed on or about February 16, 1976, the three year statute of limitations applicable to federal actions bought in New York

pursuant to 42 U.S.C. §1983 precludes all of appellant's claims. Meyer v. Frank, supra, 550 F. 2d at 728; Kaiser v. Cahn, supra, 510 F. 2d at 284; Swan v. Board of Education, supra, 319 F. 2d at 60-61.

Even if appellant's claims are not found to be time barred, he has failed to state a cause of action under 42 U.S.C. §1983 in that he has not been deprived of either a "property" or "liberty" interest, as more fully discussed supra, pp. 30-33. The grant of summary judgment against appellant Mendoza with respect to the third cause of action was, therefore, proper and should be affirmed.

(2)

In the eighth cause of action, appellant alleges that a rating which he received from his principal was discriminatory and therefore "in violation of law and the Constitution of the United States" (A56). While it is impossible to determine what "rating" appellant is questioning, he conceded in his memorandum in the District Court that no discrimination claim was in issue in this action (A27), and he does not press such a claim on this appeal.

In any case, his discrimination claim is barred by prior state court proceedings, as more fully discussed supra, pp. 7-10. Following his termination, appellant filed a discrimination complaint with the State Division of Human Rights. The Division dismissed the complaint, and the Human Rights Appeal Board affirmed the dismissal (Ex.

"C"). Thereafter, the Appellate Division, First Department, confirmed the determination of the Appeal Board. Mendoza v. State Division of Human Rights, 374 N.Y.S. 2d 241 (1st Dept. 1975).

Seventh Cause of Action

In the seventh cause of action, appellants Greenbaum, McAulay and Marland allege that appellees have not corrected appellants' files to reflect the fact that unsatisfactory ratings were reversed on either judicial or administrative appeals. On this appeal, however, appellants have apparently abandoned these claims. In any case, as held by the Court below (A22-A23), they have not alleged a constitutional deprivation cognizable by the District Court under 42 U.S.C. §1983. The unsatisfactory ratings having been reversed, correction of personnel records is merely a simple administrative procedure. Appellees maintain that such has been accomplished;* however, even if it has not, appellees' failure "can best be corrected in other ways". Bishop v. Wood, supra, 426 U.S. at 350.

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. ... The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, id., 426 U.S. at 349-350.

Since the allegations of the seventh cause of action do not raise any claim of constitutional magnitude, summary judgment against appellants was properly granted and should be affirmed.

*Appellant Marland concedes that her unsatisfactory rating has "probably" been expunged from her records (A105).

Eighth Cause of Action

In the eighth cause of action, appellants Fogel, Greenbaum, Hills, McAulay, Marland and Lubitch* allege that their principals "rated" them "in bad faith and in a discriminatory manner, in that [they] are women" (A56). On this appeal, however, appellants have apparently abandoned any claims of discrimination. In any case, the vague, conclusory and generalized allegations of the eighth cause of action, alleged without a scintilla of supporting factual data, are insufficient as a matter of law to state a claim for relief under 42 U.S.C. §1983.

Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F.2d 620 (2d Cir. 1972), cert. denied, 410 U.S. 944 (1973), was an action for damages and injunctive relief wherein it was alleged that the defendants had improperly denied the plaintiffs the right to provide day care service for children of recipients of public assistance. The Albany County Department of Social Services purchased day care services for children eligible to receive such care and paid for the services with funds provided by various government agencies. The complaint alleged that the defendants Schreck and Jay, officials of the Department, refused to purchase services from the plaintiff Center as long as plaintiff Boddie was its executive director.

*Appellant Mendoza's claims with respect to the eighth cause of action are discussed supra, pp. 35-36.

The basic constitutional claim raised by Boddie was that the refusal of Schreck and Jay to refer children to the Center was in retaliation for her activities in organizing a welfare organization and her advocacy of the interests of its members, activities which Boddie claimed were protected by the First and Fourteenth Amendments. This Court, however, held that the facts alleged in the complaint were insufficient as a matter of law to state a claim for relief under 42 U.S.C. §1983 and that the complaint had been properly dismissed. In language particularly appropriate to the instant case, this Court said (463 F.2d at 623):

> "The allegation that the refusal to refer children to the Center was a retaliatory measure designed to prevent or to inhibit plaintiff Boddie from exercising First Amendment rights is wholly conclusory. No facts were alleged which would provide any ground for believing that the refusal was politically motivated or which would tend to explain why appellees Schreck and Jay should want to retaliate against Boddie. The complaint was thus properly dismissed as insufficient as a matter of law."

See also, Powell v. Workmen's Compensation Board, 327 F. 2d 131 (2d Cir. 1964); Buck v. Board of Elections, 536 F. 2d 522 (2d Cir. 1976).

Appellants are bound to do more than merely state vague and conclusory allegations respecting the existence of an infringement of their constitutional rights. In his decision, Judge Pratt noted that "despite the court's request

at oral argument that the plaintiffs refine and document their allegations, the supplemental memorandum of law received in no way elucidated these conclusory charges and, in many instances, these issues were not even addressed" (A29). Since the allegations of the eighth cuase of action are insufficient as a matter of law to state a claim for relief, summary judgment against appellants was properly granted and should be affirmed.

Teachers United for Fair Treatment

Appellant Teachers United for Fair Treatment ("TUFT") is "a non-profit organization whose membership consists of 125 teachers who have been disciplined by the Board of Education" (A32). In light of the discussion, supra, with respect to each of the individual appellants, it is clear that TUFT lacks standing to prosecute the instant action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490 (1975). In Warth the Supreme Court held that an association may have standing solely as the representative of its members, even in the absence of injury to itself.

> "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy.... The association must allege that its members, or any of them, are suffering immediate or threatening injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to involve the court's jurisdiction." Id., at 511.

In this action, the nine individual appellants have alleged that the appellees have infringed in various ways upon their constitutional rights. What is abundantly

clear from the diversity of the claims alleged, each one arising out of a completely unique set of circumstances, is that the individual participation of each injured party is indispensable to the proper resolution of this cause.

Further, the allegation that TUFT "was formed to aid its members who have been unfairly subjected to discipline at the grievance level, at hearings before the Board of Education, and through the arbitrary use of medical and psychiatric examinations," is inadequate under the Warth guidelines to confer standing on the organization. Indeed, since none of the individual appellants have alleged causes of action cognizable by the District Court, it is not at all clear that any of the members of TUFT could make out a justiciable case had they themselves brought an action.

The Supreme Court has not, of course, "upheld an unqualified acceptance of organizational representation" (Appellants' Brief, p. 5). Pursuant to Warth, appellant TUFT does not have standing to bring the instant action on behalf of its members, and the grant of summary judgment against it should, therefore, be affirmed.*

*While appellees maintain that damages may not be awarded to appellants in this action (supra, pp. 8), it is clear, in any case, that TUFT may not seek relief in damages for alleged injuries to its members. Warth v. Seldin, supra, 422 U.S. at 515-516.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED, IN ALL RESPECTS, WITH COSTS.

November 14, 1977.

Respectfully submitted,

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321-1M-421040(53)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.: Raymond Escutia

being duly sworn, says, that on the 15 day of Nov., 1977

at No. 375 MADISON in the Borough of MANH. in The City of New York, he served three copies of the annexed APPELLEE S' BRIEF upon JOAN GOLDBERG Esq., the attorney for the APP'LTS' in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 15 day of Nov., 1977

Bruce S. Garner

Raymond Escutia

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978